

Corporate Personality, Human Rights and Multinational Corporations

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Theoretical underpinning

At the conclusion of the 20th century, the corporation cemented itself as the dominant business model around the world. The ability to raise large sums of money from the public, legal personality and transnational commercial activities had helped to reaffirm the company model as the most debated issue in commercial law.¹ Their increased acquisition of wealth and power meant that national governments had to put in place regulatory frameworks to ensure that companies function in the interest of the state. However, while most national governments were able to respond to corporate malpractices with overwhelming logic through the imposition of corporate laws, at international level corporations have been allowed to operate with limited legal constraint notwithstanding the fact that multinational corporations (MNCs) are a global phenomenon.² An escalation in human rights abuses and international torts

committed by MNCs has led to a vibrant debate over the sustainability of our current international legal order in which transnational corporate malpractices are shielded from the moderating force of international law.³ A cogent example is the recently documented conflict in the Democratic Republic of Congo, where in excess of 80 MNCs, all from industrialised nations, were implicated in an array of illegal dealings and war crimes.⁴ However, the interface between MNCs and human rights violations is not new and can be traced back to the dawn of the colonial era.⁵ Treaties of capitulation and concessions contracts signed during the colonial period placed no limitations on corporate power, culminating in organised exploitation and abuse of both physical and human resources.⁶ Although decolonisation led to the introduction of voluntary codes of conduct, these have been replaced by “rapid globalisation of the *laissez-faire* world market”⁷ and corporate strategic decision-making premised on shareholder value maximisation.

Today, MNCs participate in 70% of all global trade, produce 25% of the world’s goods, and employ as many as 90 million people.⁸ However, flowing directly from such positions of economic influence, MNCs also exercise considerable political leverage in both domestic and international spheres.⁹ As a result, it has become increasingly difficult to monitor MNC activities and thus hold them to account for malpractices and human rights violations.¹⁰ There are many reasons for this, and the first concerns the issue of jurisdiction. The transnational nature of MNCs activities has enabled them to operate in multiple jurisdictions, and some of these jurisdictions are ill equipped to properly monitor and maintain minimum standards of treatment.¹¹ Moreover, MNCs are notorious for outsourcing their activities to less developed countries so as to benefit from their weak regulations, which attract

¹ The term “corporations” or “enterprises” is used with regard to legal persons profiting from commercial or governmental activities. In relation to “multinational corporations”, this article adopts the definition of “transnational corporations” as is laid out in the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” as “an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries—whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively”. See UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

² Nora Gotzmann, “Legal Personality of the Corporation and International Criminal Law: Globalisation, Corporate Human Rights Abuses and the Rome Statute” (2008) 1(1) Q.L.S.R. 38; Jennifer A. Zerk, *Multinationals and CSR: Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006), p.1 (traditionally, international law played a role only in relation to rights and responsibilities of states. Non-state actors such as corporations are relatively new to the scene.)

³ J. Cassels, *The Uncertain Promise of Law: Lessons of Bhopal* (Toronto: University of Toronto Press, 1993); and John Gerard Ruggie, *Just Business Multinational Corporations and Human Rights* (New York: W.W. Norton & Co, 2013), p.xv.

⁴ David Weissbrodt, “Business and Human Rights” (2005) 74 *University of Cincinnati Law Review* 55, 57.

⁵ Omolafi Amao, *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries* (Abingdon: Routledge Research in Corporate Law, 2011), p.20.

⁶ See K.J. Vandeveld, “A Brief History of International Investment Agreements” (2005) 12(1) *UC Davis Journal of International Law & Policy* 157; E.M. Borchard, “Limitations on Coercive Protection” (1927) 21 A.J.I.L. 303; Ian Brownlie, *International Law and the Use of Force by States* (New York and London: Oxford University Press, 1963), pp.14–30; and Steven R. Ratner, “Corporations and Human Rights: A Theory of Legal Responsibility” (2001) 11 *Yale Law Journal* 443, 452.

⁷ Ratner, “Corporations and Human Rights” (2001) 11 *Yale Law Journal* 443, 452–458.

⁸ Weissbrodt, “Business and Human Rights” (2005) 74 *University of Cincinnati Law Review* 55, 59; Medard Gabel and Henry Bruner, *Global Inc.: An Atlas of the Multinational Corporation* (New York: The New Press, 2003), p.5 (citing “A Survey of Multinationals”, *The Economist*, 27 March 1993, pp.2 and 9); “TNCs reportedly control 90% of the world’s technology patents”: Howard A. Kwon, “Patent Protection and Technology Transfer in the Developing World: The Thailand Experience” (1995) 28 *Geo. Wash. J. Int’l L. & Econ.* 567, 570, fn.13 (citing Suwanna Asavaroengchai, “Seeking a Fair Deal in Global Trade”, *Bangkok Post*, 19 October 1994, p.31); Tom Athanasiou, *Dividend Planet: The Ecology of Rich and Poor* (Athens, GA/London: University of Georgia Press, 1996), p.194; David Korten, *When Corporations Rule the World* (San Francisco: Berrett-Koehler Publishers, 1995), p.124; and United Nations Conference on Trade and Development (UNCTAD), *World Investment Report* (2001), p.9.

⁹ David Kinley and Junko Tadaki, “From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law” (2004) 44 *Virginia Journal of International Law* 931, 933.

¹⁰ Gotzmann, “Legal Personality of the Corporation and International Criminal Law” (2008) 1(1) Q.L.S.R. 38, 40.

¹¹ Claudio Grossman and Daniel D. Bradlow, “Are we Being Propelled Towards a People-centered Transnational Legal Order?” (1993) 3 *Am. U.J. Int’l & Pol’y* 1, 8 (“[t]he fact that they have multiple production facilities means that [transnational corporations] can evade state power and the constraints of national regulatory schemes by moving their operations between their different facilities around the world”); Nicola Jägers, “The Legal Status of the Multinational Corporation Under International Law” in Michael K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague/London/Boston: Kluwer Law International, 1999), p.260; and Ratner, “Corporations and Human Rights” (2001) 11 *Yale Law Journal* 443, 461.

very limited sanctions for torts and human rights violations.¹² Secondly, a lack of sufficient protection against MNCs at domestic level, especially in less developed states, is largely due to the overwhelming importance attached to economic growth and the idea of a globalised free market.¹³ Against this background, domestic measures are no longer sufficient to deal with corporate abuses on a transnational scale.¹⁴

Corporate law is a fast developing field and an increasingly important component of legal systems around the world; however, corporate social responsibility is a similarly important discipline owing to the human rights implications of commercial conduct. In the last decades, the United Nations has attempted to consider whether international human rights law is intertwined with the imposition of criminal liability, insofar as multinational corporations engage in activities that may result in harm or human rights abuses.

Despite these challenges, there has been a notable movement towards international corporate social responsibility—driven forward by NGOs and similar bodies—buttressed by the belief that some commercial abuses should be enforced at international level.¹⁵ This has resulted in a proliferation of voluntary codes of conduct to ensure compliance with internationally accepted minimum standards of treatment and has consequently led to a more ethical approach by MNCs.¹⁶ It is important to note, however, that these codes do not entail any enforcement mechanism and thus remain entirely voluntary (soft law), thereby providing very limited protection against transnational corporate abuses. This raises the question: in the absence of reliable international and domestic regulation, are MNCs free to pursue short-term profit maximisation goals, irrespective of the impact on local communities and the welfare of the host state?

In order to facilitate this discussion, the article begins by exploring the challenges posed by a lack of international corporate personality and MNCs accountability at international level.¹⁷ Secondly, significant legal developments at international level are assessed to determine the extent to which they have been successful in holding MNCs accountable. The Guiding Principles on Business and Human Rights introduced by Ruggie in 2011¹⁸ form part of this discussion. Thirdly, a proposal to codify Principle No.2,

“an independent corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and address adverse impacts with which they are involved,”

is advanced.¹⁹ Last but not least, a conclusion that ties together the various strands of argument through this article is provided.

Multinational corporations and international human rights law

In the latter half of the 20th century, the forces of globalisation allowed companies to pursue international trade, and in the process reigniting the age-old challenge of regulating international corporate activities.²⁰ Some of the most notable cases of human rights violations involving MNCs during that period include BP in Columbia,²¹ Shell in Ogoniland²² and Unocal in Burma (Myanmar).²³ However, human rights abuses involving corporate actors are not new, having been documented during the apartheid era in South Africa,²⁴ the Second World War where slave labour was prevalent in Nazi Germany,²⁵ to the mistreatment of workforce on colonised plantations during and in the aftermath of the abolition of slavery.²⁶ In this century, the traditional theory

¹² Milton Friedman, cited in Michael K. Addo, “Human Rights and Transnational Corporations: An Introduction” in Addo, *Human Rights Standards and the Responsibility of Transnational Corporations* (1999), pp.3–38, p.11; Eric Engle, “Extraterritorial Corporate Criminal Liability: A Remedy for Human Rights Violations?” (2006) 20 *St. John’s Legal Comment* 287, 300; Grossmann and Bradlow, “Are We Being Propelled Towards a People-centered Transnational Legal Order?” (1993) 9 *American University Journal of International Law & Policy* 1, 8; Cynthia A. Williams, “Corporate Social Responsibility in an Era of Economic Globalisation” (2002) 35 *UC Davis Law Review* 705, 769.

¹³ *Harvard Law Review Association* (HLRA), “Developments in the Law: V. Corporate Liability for Violations of International Human Rights Law” (2001) 114 *Harvard Law Review* 2025, 2031; and Ratner, “Corporations and Human Rights” (2001) 111 *Yale Law Journal* 443, 457.

¹⁴ Barnali Choudhury, “Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses” (2005) 26 *North-Western Journal of International Law & Business* 43, 74–75; Jägers, “The Legal Status of the Multinational Corporation Under International Law” in Addo, *Human Rights Standards and the Responsibility of Transnational Corporations* (1999), p.261; and Ratner, “Corporations and Human Rights” (2001) 111 *Yale Law Journal* 443, 461–473.

¹⁵ Kinley and Tadaki, “From Talk to Walk” (2004) 44 *Virginia Journal of International Law* 931, 934.

¹⁶ Ratner, “Corporations and Human Rights” (2001) 111 *Yale Law Journal* 443, 448.

¹⁷ Vincent Chetail, “The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward” (6 December 2013) in D. Alland, V. Chetail, O. de Frouville and J.E. Vinuales (eds), *Unity and Diversity of International Law: Essays in Honour of Prof. Pierre-Marie Dupuy* (Boston/Leiden: Martinus Nijhoff Publishers, 2014), p.106, SSRN. Available at: <http://ssrn.com/abstract=2364450> [Accessed 3 May 2016].

¹⁸ Ruggie, *Just Business Multinational Corporations and Human Rights* (2013), p.xi.

¹⁹ Ruggie, *Just Business Multinational Corporations and Human Rights* (2013), p.xxi.

²⁰ Peter T. Muchlinski, “Human Rights and Multinationals: Is There a Problem?” (2001) 77 *International Affairs* 1, 31.

²¹ “BP accused of funding Colombian death Squads”, *Observer*, 20 October 1996, pp.1 and 18.

²² Human Rights Watch, *Nigeria, The Ogoni Crisis: A Case Study of Military Repression in South East Nigeria* (New York: Human Rights Watch, 1995); Ben Naanen, “Oil Producing Minorities and the Restructuring of Nigerian Federalism: The Case of the Ogoni Uprising People” (1995) 33 *Journal of Commonwealth and Comparative Politics* 45; Eghosa Osaghae, “The Ogoni Uprising: Oil, Politics, Minority Agitation and the Future of the Nigerian State” (1991) 94 *African Affairs* 325; S. Skogly, “Complexities in Human Rights Protection: Actors and Rights Involved in the Ogoni Conflict in Nigeria” (1997) 15 *N.Q.H.R.* 52; and Heike Fabig, “The Body Shop and the Ogoni” in Addo, *Human Rights Standards and the Responsibility of Transnational Corporations* (1999), pp.309–321.

²³ *Doe v Unocal*, US Dist. Ct, C.D. Cal., 31 August 2000, 2000 U.S. Dist. LEXIS 13327; William Branigin, “Claim Against Unocal Rejected: Judge Cites Evidence of Abuses in Burma but No Jurisdiction”, *Washington Post*, 8 September 2000, p.E10.

²⁴ John Daniel, Vanusha Naidoo and Sanusha Naidu, “The South Africans Have Arrived: Post-Apartheid Corporate Expansion into Africa” in John Daniel, Adam Habib and Roger Southall (eds), *State of the Nation: South Africa 2003–2004* (Pretoria: Human Sciences Research Council, 2003), p.368.

²⁵ John C. Beyer and Stephen A. Schneider, “Forced Labor under the Third Reich”, Study Paper (Nathan Associates Inc, 1999).

²⁶ See the example of Siemens; B.M. Magubane, “Reflections on the Challenges Confronting Post-Apartheid South Africa”, Discussion Paper Series No.7 (1994). Available at: <http://www.unesco.org/most/magu.htm> [Accessed 3 May 2016].

signifying that states are the primary bearers of human rights obligations has been challenged by the academic community.²⁷ Likewise, with NGOs making greater use of technology and thereby bringing to light human rights violations involving MNCs, the international legal order has been rendered increasingly untenable. However, despite its appeal, extending human rights obligations to private entities such as MNCs, or, as Andrew Clapham suggests, “the private sphere”, would require a radical change in the social, political and legal structures that underpin our established conception of human rights.²⁸ Thus, a discussion of MNCs and human rights obligations has never been more significant.

The concept of human rights first appeared in English law in the form of a “right to private property”, owing to the historic imbalance extant in the property rights of individuals with that of the dominant monarchic state in which they subsisted.²⁹ By the turn of the 19th century, the notion of human rights had developed further and began to distinguish groups of individuals.³⁰ As one academic commentator observed, “while by no means the prerogative of ‘modernity’, the large number of human beings were excluded by this peculiar ontological construction”.³¹ The notion of human rights did not extend to slaves, indigenous people or the mentally disabled.³² On the other hand, it resulted in the furtherance of protection for private accretions of wealth. For example, Protocol 1 art.1 of the European Convention on Human Rights (ECHR) clearly states that “every natural or legal person is entitled to the peaceful enjoyment of his possessions”.³³

Despite some contentions that international treaties may be construed so as to apply directly to private entities such as MNCs,³⁴ there is a consensus among legal commentators that such treaties can only bind states and state actors.³⁵ Additionally, while the US has made some efforts to impose human rights obligations on MNCs through their national laws,³⁶ and similar attempts have been made by the UN Sub-Commission in the form of the “Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”,³⁷ MNCs have simply not received sufficient recognition by the international community to

be held accountable for human rights obligations. But, in light of the changing economic landscape, and the fact that MNCs are now a part of the international legal order, albeit in the absence of international legal personality, the legal order must be reformed so as to accommodate these powerful entities and prevent abuse of their dominant position.

Non-state actors as duty bearers

One of the fundamental elements of international law is that it regulates conduct among states; subsequently, when international law first began to evolve, states were the only subjects of international law. Governments were the main bearers of responsibility for most human rights violations, and thus the biggest share of responsibility for compliance with human rights norms and principles was vested in the state. Corporations traditionally possessed less ethical obligations since their actions are—in principle—driven by profit,³⁸ i.e. maximising shareholders’ investments and returning profit to the shareholder. The question then becomes: if states are the only subjects of international law, do non-state actors possess human rights obligations under international law? Philip Alston describes this anomaly as the “not-a-cat” syndrome that appears in the conduct of non-state actors, including multinational corporations to avoid accountability or criminally liability for their misconduct.³⁹

Sensu stricto, international human rights law is primarily concerned with individual human beings, even though it has evolved to recognise that persons that may not be regarded as “state actors” still hold human rights obligations whether those violating international law do so by acting under the patronage of the state or only as private individuals.⁴⁰ The International Covenant on Civil and Political Rights 1966 further supports the view that not only states but also groups and legal persons may be held accountable for human rights violations.⁴¹ International law poses strict human rights obligations on states to respect and protect the rights of individuals within their territory and jurisdiction, including actions from third parties resulting in human rights violations.

²⁷ Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006).

²⁸ Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993); Michael Addo, “The corporation as victim of human rights violations” in P. Alston et al. (eds), *The EU and Human Rights* (Oxford: Oxford University Press, 1999), pp.187–197; M.T. Kamminga, “Holding multinational corporations accountable” in P. Alston et al. (eds), *The EU and Human Rights* (Oxford: Oxford University Press, 1999), pp.553–569, p.569; *Young James and Webster v UK* (1981) ECtHR Series A, Vol.139; and *Costello-Roberts v UK*, (1993) ECtHR Series A, Vol.247.

²⁹ C.B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford: Oxford University Press, 1962).

³⁰ Muchlinski, “Human Rights and Multinationals: Is There a Problem?” 77 (2001) 77 *International Affairs* 1, 33.

³¹ Upendra Baxi, “Voices of Suffering and the Future of Human Rights” (1998) 8 *Transnational Law and Contemporary Problems* 126, 135.

³² Baxi, “Voices of Suffering and the Future of Human Rights” (1998) 8 *Transnational Law and Contemporary Problems* 126, 135.

³³ Human Rights Review (2012), available at: <https://www.equalityhumanrights.com/en/publication-download/human-rights-review-2012> [Accessed 3 May 2016].

³⁴ J.J. Paust, “The Reality of Private Rights, Duties, and Participation in the International Legal Process” (2004) 25 *Michigan Journal of International Law* 1229, 1242.

³⁵ J. Delbrück, “Third-Party Effects of Fundamental Rights through Obligations under International Law?” (1975) 12 *Law and State* 61, 64.

³⁶ S. Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2004), p.21; US Supreme Court in *Sosa v Alvarez-Machain* 124 S. Ct 2739 (2004).

³⁷ Sub-Commission Resolution 2003/16 (13 August 2003), para.2, reprinted in *Report of the Sub-Commission on the Promotion and Protection of Human Rights on its Fifty-Fifth Session*, UN Doc. E/CN.4/2004/2, E/CN.4/Sub.2/2003/43 (20 October 2003), p.51.

³⁸ Beth Stephens, “The Amoralism of Profit: Transnational Corporations and Human Rights” (2002) 20 *Berkeley Journal of International Law* 45.

³⁹ Philip Alston, *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005), p.3.

⁴⁰ *Kadic v Karadzic* 74 F. 3d 377 (2nd Cir. N.Y., 6 January 1996) (No. 94-9035, 1544, 94-9069, 1541).

⁴¹ See art.5(1) ICCPR 1966 declaring that: “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.”

Human rights violations may be attributed to the state through the actions of third parties, or in situations where they fail to take appropriate steps (legislation or other domestic policies) to prevent, investigate, punish and redress the actions of third parties.

Multinational corporations, therefore, can be duty bearers and responsible for human rights violations and internationally wrongful acts even without the presence of a link suggesting state action or complicity. Corporate legal personality and legal responsibility was recognised by the International Court of Justice in the *Barcelona Traction* case, where the court held that “[o]nly the company, which was endowed with legal personality, could take action in respect of matters that were of a corporate character”.⁴² This was further reiterated by the Court of Justice in *Ahmadou Sadio Diallo*, where it was held that “in determining whether a company possesses independent and distinct legal personality, international law looks to the rules of the relevant domestic law”.⁴³

Legal developments in international law

The genesis of international law can be traced back to the 18th century, at a period when diplomatic protection and treaties of capitulation were commonly used mechanisms for protecting foreign nationals and their property.⁴⁴ Thus, protection of foreign property and development of international commercial markets, spearheaded by multinational companies such as the East India Company (EIC), were central to the development of international law. During the 18th century, the EIC was commissioned on the Indian sub-continent to trade in silks and spices.⁴⁵ The collection of taxes for the provinces of Bengal, Bihar and Orissa in India were thereafter subcontracted to the EIC, which utilised a private army to enforce tax duties.⁴⁶ In its role as a tax collecting agency on behalf of the realm, fortified by expansive political and legal influence, the EIC could no longer be considered an orthodox company. This transformed the EIC into a destructive, avaricious and profit-driven colonial entity.⁴⁷ By 1803, the dangerously unregulated MNC, wielding a

260,000-strong army, had taken control of an entire subcontinent through aggressive imperialistic policies. The EIC’s acts of armed conquests, subjugation and the looting of vast territories across southern Asia were later to be considered the most morally indefensible and blatantly violent acts in corporate history.⁴⁸ Thus, even before the advent of globalisation, EIC provided a strong example of the scale of corporate abuse possible when MNC activities remain unregulated.

Despite the dangers posed by MNCs such as the EIC, it was their desire to secure foreign interests that ultimately led to the introduction of principles of state responsibility into customary international law.⁴⁹ In 1758, Emmerich Vattel advanced that “whoever uses a citizen ill, indirectly offends the State, which is bound to protect this citizen”.⁵⁰ He was of the view that states were within their rights to set pre-conditions on the admission foreign nationals, and once in the host state they should be subject to the same laws as home nationals.⁵¹ However, he also believed that foreign nationals should remain members of their home state and for that reason should not be “obliged to submit, like subjects, to all the commands of the sovereign”.⁵² Thus, a foreign national retains membership of his home state, including the right to private property which was considered central to the wealth of nations.⁵³ Thus, Vattel disagreed with the “*droit d’aubaine*” and the “right of *escheat*”—decrees which were understood to mean that on the death of a foreign national, his property would automatically revert to his host state.⁵⁴ As a result, the maltreatment of a foreign national or his property by the host state was to be considered an injury done to his home state. This assessment ultimately formed the basis of the diplomatic protection principle enshrined in international law. The principle is premised on the idea that a harm done to a state’s national is treated as a harm done to the state itself, thus entitling the injured national state to claim damages.⁵⁵ Although diplomatic protection would in the mid-20th century be replaced by investment treaty arbitration,

⁴² *Case concerning the Barcelona Traction, Light and Power Company Ltd* (New Application: 1962) (*Belgium v Spain*), judgment of 5 February 1970, ICJ.

⁴³ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Preliminary Objections, 24 May 2007 [2007] ICJ Reports 194.

⁴⁴ Yoram Dinstein, “Diplomatic Protection of Companies Under International Law” in Karen Wellens (ed.), *International Law: Theory and Practice: Essays in Honour of Eric Suy* (The Hague/Boston/London: Martinus Nijhoff, 1998), p.506.

⁴⁵ See Nick Robins, “The world’s first multinational” (13 December 2004), *New Statesman*. Available at: <http://www.newstatesman.com/politics/politics/2014/04/worlds-first-multinational> [Accessed 6 September 2015].

⁴⁶ William Dalrymple, “The East India Company: the original corporate raiders” (4 March 2015), *Guardian*. Available at: <http://www.theguardian.com/world/2015/mar/04/east-india-company-original-corporate-raiders> [Accessed 3 May 2016].

⁴⁷ Dalrymple, “The East India Company” (4 March 2015), *Guardian*.

⁴⁸ Dalrymple, “The East India Company” (4 March 2015), *Guardian*.

⁴⁹ K.J. Vandeveld, “A Brief History of International Investment Agreements” (2005) 12(1) *U.C. Davis Journal of International Law & Policy* 157; and K. Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013), Pt 1.

⁵⁰ E. Vattel and J. Chitty, *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (Philadelphia: T. & J.W. Johnson, 1844), p.161.

⁵¹ Vattel and Chitty, *The Law of Nations* (1844), pp.100 and 104.

⁵² Vattel and Chitty, *The Law of Nations* (1844), p.108.

⁵³ Vattel and Chitty, *The Law of Nations* (1844), p.109.

⁵⁴ A.H. Roth, *The International Minimum Standard* (Leiden: Sijthoff, 1949), pp.26–27; E.M. Borchard, *Diplomatic Protection of Citizens Abroad or The Law of International Claims* (New York: Banks Law Publishing Co, 1915), pp.35–36.

⁵⁵ Annemarieke Vermeer-Künzli, “As If: The Legal Fiction in Diplomatic Protection” (2007) 18(1) *European Journal of International Law* 37, 37.

stronger national laws and a slew of international codes of conduct, it marked the first international attempt to invoke international law in matters involving MNCs.⁵⁶

However, diplomatic protection was not a mechanism for controlling the activities of MNCs, but rather a means of enforcing claims on behalf of injured foreign nationals. Throughout the 19th and early 20th century, aggressive strategies to secure diplomatic protection for claims were more often employed by potent states.⁵⁷ For instance, in the period between 1820 and 1914, Britain alone interfered in Latin-America in excess of 40 times to either safeguard their property or reinstate order,⁵⁸ even where claims were fallacious in nature and the punishment unjust.⁵⁹ This culminated in the Western/Eastern divide, in which opposition by developing nations mainly in Latin-America against Western-led international law standards grew, while, although insisting on such standards, the West depended on treaties of capitulation and diplomatic protection to impose extraterritorial jurisdiction and secure their foreign economic interests.⁶⁰ Although an increase in global trade and investment in the 20th century, especially between Western states, led to a decline in the officious practices foreshadowing the rise of an investor-friendly model, the historic opposition to Western imperialistic international standards, coupled with corporate personality, would defeat any attempt at formulating international legal standards for MNCs.

The development of international human rights emerged more strongly than ever shortly after the Second World War, but also highlighted the first major challenge at formulating an international legal structure for corporations.⁶¹ Its development epitomised the pinnacle of mankind's efforts to structure and formalise social advancement on a global scale. It is perhaps indicative of the importance of human rights that their regulation and enforcement could not be delegated to individual national states; rather, this was considered a combined international duty.⁶² The fundamental basis of these rights is the Universal Declaration of Human Rights (UDHR), adopted by resolution of the General Assembly of the United Nations in 1948.⁶³ The UDHR is directed towards protecting human dignity through its various articles on fundamental freedoms and rights. It states that "every

organ of society"—a term which possibly includes juridical persons—"shall strive by teaching and education to promote respect for these rights and freedoms".⁶⁴ Thus, despite being primarily directed towards states, it does nevertheless address non-state actors too. However, this statement is only contained within the Preamble and has not achieved customary international law status. Nevertheless, the UDHR is merely a declaration and for that reason it is non-binding, imposing only ethical duties on MNCs at best.⁶⁵ Thus, a feeble attempt at imposing international responsibilities on companies left an important question unanswered; do human rights obligations extend to MNCs despite their legal personality? Subsequent attempts at formulating international responsibilities for companies have shown that legal personality enables companies to enjoy non-state actor rights but with no responsibilities, despite operating on an international platform.⁶⁶

Furthermore, the ghosts of diplomatic protection and treaties of capitulation have been a derailing factor towards adopting Western-led international law standards. For instance, during the 1974 Declaration on the Establishment of a New International Economic Order (NIEO Declaration) and the Charter of Economic Rights and Duties of States,⁶⁷ newly independent states especially from Latin-America showed a general reluctance towards international law standards. The NIEO Declaration provides that neo-colonial practices such as covert investment strategies and the use of corporations to influence decision making in weaker nations are a hindrance not only to the advancement of international law, but also to the protection of emerging states' interests. The NIEO Declaration also restated the principle of permanent sovereignty, and in so doing included the states' right to regulate MNCs. The Charter, however, simply elaborated on the principles already contained within the NIEO Declaration and included some supplementary measures to protect foreign investments.⁶⁸ These supplementary measures recognised a state's right to regulate all investments within its territory but stressed that a state cannot be obliged to accord more favourable treatment to the investments of a foreign national.⁶⁹ However, despite the Charter confirming a state's right

⁵⁶ H.J. Steiner and D.F. Vagts, *Transnational Legal Problems: Materials and Text*, 2nd edn (Mineola, NY: Foundation Press, 1976) 357; Miles, *The Origins of International Investment Law* (2013), Pt 1; S.N. Guha Roy, "Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?" (1961) 55 *American Journal of International Law* 863.

⁵⁷ M. Hood, *Gunboat Diplomacy 1895–1905* (London: George Allen & Unwin, 1975); J. Cable, *Gunboat Diplomacy, 1919–1979: Political Applications of Limited Naval Force*, 2nd edn (London: Macmillan, 1981).

⁵⁸ C. Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (Berkeley: University of California Press, 1985), p.54.

⁵⁹ D.R. Shea, *The Calvo Clause* (Minneapolis: University of Minnesota Press, 1955), p.12.

⁶⁰ M. Sornarajah, *The International Law on Foreign Investment*, 2nd edn (Cambridge: Cambridge University Press, 2004), pp.19–20;

⁶¹ Mashood A. Baderin and Manisuli Ssenyonjo, *Development of International Human Rights Law Before and After the UDHR* (Aldershot: Ashgate Publishing, 2013), Ch.1: "International Human Rights Law", p.1.

⁶² Paul Redmond, "Business and human rights: the emerging international regime for corporate responsibility and accountability", OECD Watch Diplomacy Training Program 1, Ch.6.

⁶³ Universal Declaration of Human Rights, GA res. 217A (III), UN Doc. A/810 (1948), p.71.

⁶⁴ See Universal Declaration of Human Rights, available at: <http://www.un.org/en/documents/udhr/index.shtml#ap> [Accessed 3 May 2016].

⁶⁵ Kinley and Tadaki, "From Talk to Walk" (2004) 44 *Virginia Journal of International Law* 931, 949.

⁶⁶ Peter Muchlinski, "Multinational Enterprises as Actors in International Law" in Math Noortmann and Cedric Ryngaert (eds), *Non-State Actor Dynamics in International Law* (Aldershot: Ashgate, 2010).

⁶⁷ Declaration on the Establishment of a New International Economic Order, GA Res. 3201 (1 May 1974) (1974) 13 I.L.M. 715; Charter of Economic Rights and Duties of States, GA Res. 3281 (12 December 1974) (1975) 14 I.L.M. 251; and M. Bedjaoui, *Towards a New International Economic Order* (New York: Holmes & Meier, 1979).

⁶⁸ Charter of Economic Rights and Duties of States, GA Res. 3281 (12 December 1974) (1975) 14 I.L.M. 251, s.2.2.

⁶⁹ Charter of Economic Rights and Duties of States 1974 (1975) 14 I.L.M. 251, 264. Subparagraph (a) was approved by 113 states and opposed by 10. Four states abstained from voting.

to regulate MNCs, it expanded on this provision by encouraging co-operation between states when determining the regulation of MNCs.⁷⁰ Both the NIEO Declaration and Charter were ultimately advanced by the combined force of the developing nations who wished to aver their national sovereignty to the world. However, the Declaration and Charter had no binding authority and as a consequence could not replace extant laws.

However, not all provisions of the Declaration and Charter were abandoned. Indeed, the passages relating to the strict regulation of MNCs reappeared in 1974 when a Commission on Transnational Corporations was assembled by the UN Economic and Social Council in order to establish a draft Code of Conduct on Transnational Corporations.⁷¹ This once again resulted in a divide between capital importing and capital exporting countries owing to their concerns about the extent of its application. The question that both these countries wanted urgent answers to was whether the Code applied only to the conduct of MNCs or whether its application extended to the host state's treatment of foreign nationals. In 1980, the UN Economic and Social Council replied and stated that the Code would be applicable in both cases.⁷² However, after a decade of negotiations, the Code was finally dropped.⁷³

The frustration of the NIEO Declaration, the Charter and shortly thereafter the Code did not prevent international law from pursuing other avenues to achieve an adequate international framework for the regulation of MNCs. Further legal attempts to regulate corporate behaviour at international level came in the period between 1960 to the late 1970s. These developments are explored below in chronological order. However, many of these attempts were met with fierce resistance from MNCs and national governments. The failure to reach a consensus on mandatory regulation of MNCs culminated in a self-regulatory approach.⁷⁴

OECD Guidelines

The OECD Declaration on International Investment and Multinational Enterprises 1976 represents the first major attempt at formulating international standards for MNCs.⁷⁵ It covered an array of principles on the national treatment

of MNCs as well as general OECD Guidelines on Multinational Enterprises recommended by OECD Member States to ensure compliance with the policies of host states.⁷⁶ The purpose of the Guidelines was to promote foreign direct investment and, in doing so, encourage “the positive contribution which multinational enterprises can make towards economic and social progress”.⁷⁷ The Guidelines covered specific areas such as employment and industrial relations, the environment, combatting bribery, consumer interests, science and technology, competition and taxation.⁷⁸ Furthermore, the Guidelines also recognised the legitimate right of a state to govern the activities of MNCs in parallel to standards of international law.⁷⁹ A revised version of the Guidelines was adopted in 2000, which recommended MNCs to “respect the human rights of those affected by their activities” for the very first time.⁸⁰ The latest revision in 2011 expanded on this recommendation by introducing an entire chapter on human rights.⁸¹ It requires MNCs to respect human rights, avoid causing or contributing to adverse human rights impacts, address and seek ways to prevent or mitigate these impacts, have a policy commitment to respect human rights, carry out human rights due diligence, and provide for remediation of adverse human rights impacts.⁸²

However, it is important to note that the Guidelines do not represent hard law and are only “soft law” initiatives designed to promote and encourage responsible business conduct. Companies that choose not to adhere to these Guidelines can simply put forward their reasons for not doing so, and the only ramifications they will suffer is reputational damage to their international image. Thus, “non-adherence will not render an MNC in strict technical breach of the Guidelines”.⁸³ As a result, the Guidelines are more often than not met with cynicism by many companies. There is, however, an implementation mechanism for the Guidelines.⁸⁴ To give effect to the Guidelines, it requires Member States to set up national contact points (NCPs) to promote the Guidelines and “contribute to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances”.⁸⁵ The “specific instances” scenario arises when a third party alleges that there has been a breach of the Guidelines by a business. In these instances, the “NCP

⁷⁰ Charter of Economic Rights and Duties of States 1974 (1975) 14 I.L.M. 251 at 264 subpara.(b).

⁷¹ Peter Muchlinski, *Multinational Enterprises and the Law*, 2nd edn (Oxford: Oxford University Press, 2007), p.660; and W. Spröte, “Negotiations on a United Nations Code of Conduct for Transnational Corporations” (1990) 33 G.Y.I.L. 331.

⁷² Peter Muchlinski, *Multinational Enterprises and the Law* (Cambridge MA: Blackwell Publishers, 1995), p.593.

⁷³ The draft Code is available in (1984) 23 I.L.M. 626; and Muchlinski, *Multinational Enterprises and the Law* (1995), p.661.

⁷⁴ Catherine Pedamon, “Corporate Social Responsibility: A New Approach to Promoting Integrity and Responsibility” (2010) 31 *Company Lawyer* 172, 173.

⁷⁵ “The OECD Declaration and Decisions on International Investment and Multinational Enterprises”, DAF/IME(2011)20 (reviewed 2011). Available at: <http://www.oecd.org/investment/investment-policy/oecddeclarationanddecisions.htm> [Accessed 3 May 2016].

⁷⁶ Engobo Emesh, Rhuks Ako, Patrick Okonmah and Lawrence Ogechukwu Obokoh, “Corporations, CSR and Self Regulation: What lessons from the Global Financial Crisis?” (2010) 11(2) *German Law Journal* 239.

⁷⁷ OECD Guidelines on Multinational Enterprises, para.2. The original Guidelines are reproduced at (1976) 15 I.L.M. 967.

⁷⁸ OECD Guidelines on Multinational Enterprises (2008). Available at: <http://www.oecd.org/corporate/mne/1922428.pdf> [Accessed 3 May 2016].

⁷⁹ OECD Guidelines on Multinational Enterprises (2008), para.9 states: “Governments adhering to the Guidelines set them forth with the understanding that they will fulfil their responsibilities to treat enterprises equitably and in accordance with international law and with their contractual obligations.”

⁸⁰ “The OECD Declaration and Decisions on International Investment and Multinational Enterprises”, DAF/IME (2000), p.20. Available at: <http://www.oecd.org/corporate/mne/1922428.pdf> [Accessed 3 May 2016].

⁸¹ OECD Guidelines on Multinational Enterprises (2011). Available at: <http://www.oecd.org/corporate/mne/48004323.pdf> [Accessed 3 May 2016].

⁸² OECD Guidelines on Multinational Enterprises (2011).

⁸³ S. Tully, “The 2000 Review of the OECD Guidelines on Multinational Enterprises” (2001) 50 *International and Comparative Law Quarterly* 394, 403.

⁸⁴ See OECD Guidelines on Multinational Enterprises (2008), Pt II: “Implementation Procedures of the OECD Guidelines for Multinational Enterprises”, pp.27–33.

⁸⁵ See OECD Guidelines on Multinational Enterprises (2008), Pt II, pp.27–33.

will offer a forum for discussion” and also seek advice from the Committee on International Investment and Multinational Enterprises (CIME) on “the interpretation of the Guidelines in particular circumstances” and “facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist the parties in dealing with the issues”.⁸⁶ However, the NCP and the CIME do not have any enforcement powers and only perform consultative, advisory and clarificatory roles.⁸⁷ Thus, the Guidelines can be written off as nothing more than mere moral requests.

ILO Tripartite Declaration

Not long after the OECD Guidelines were introduced, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (the Tripartite Declaration) was released.⁸⁸ The Tripartite Declaration has been amended twice in 2000⁸⁹ and 2006⁹⁰ and provides guidelines for governments, multinational enterprises, employers and workers’ organisations which they are “recommended to observe on a voluntary basis”.⁹¹ Reacting to concerns about labour standards and social issues, the Tripartite Declaration contains guidelines on employment, training, conditions of work and life, and industrial relations.⁹² There is also specific reference to human rights, which provides that all parties “should respect the Universal Declaration of Human Rights”.⁹³ Moreover, the 2000 version brought with it some positive improvements in the area of human rights protection whereby a new passage was incorporated which provides that

“[m]ultinational enterprises, as well as national enterprises, should respect the minimum age for admission to employment or work in order to secure the effective abolition of child labour”.⁹⁴

Thus, despite the lack of general human rights protection, the coverage for workers’ rights is extensive. Moreover, the tripartite nature of the Tripartite Declaration is a positive step forward as it indicates the backing of

governments, employers and workers. Nevertheless, despite the reference to the UDHR and the positive improvements to eliminate child labour and so forth, the Tripartite Declaration remains entirely voluntary, with only aspirational principles.⁹⁵ Furthermore, there are no express provisions concerning monitoring arrangements or implementation devices to ensure MNCs’ compliance with the Tripartite Declaration. However, when governments, multinational enterprises and employers’ and workers’ organisations give effect to the Tripartite Declaration, this is monitored by way of a periodic survey.⁹⁶ All four parties are thus obliged to take part in a survey whereby they are required to provide responses to questions about their experience concerning the implementation of the Tripartite Declaration. Once these responses have been examined, recommendations may be adopted by the ILO Governing Body.⁹⁷ Although some guidance exists on the conduct of MNCs, in reality, MNCs cannot be compelled to comply with the Tripartite Declaration as it lacks the necessary legal mandate.⁹⁸

UN Global Compact

The UN Global Compact was launched in July 2000 after it was introduced by the UN Secretary-General, Kofi Annan, in January 1999 in Davos.⁹⁹ Today the Global Compact has over 10,000 participants from 130 countries, making it the largest non-binding corporate responsibility initiative worldwide. The Global Compact is a “soft law” policy initiative for businesses which voluntarily commit to respect and support 10 principles in the areas of human rights, labour, the environment and anti-corruption,¹⁰⁰ derived from the UDHR, the ILO’s Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the UN Convention against Corruption.¹⁰¹ Principles 1 and 2 concern human rights and state that:

“Businesses should support and respect the protection of internationally proclaimed human rights; and make sure that they are not complicit in human rights abuses.”¹⁰²

⁸⁶ See OECD Guidelines on Multinational Enterprises (2008), Pt II, pp.27–33.

⁸⁷ Surya Deva, “Human Rights Violations by Multinational Corporations and International Law: Where from Here?” (2003) 19 *Connecticut Journal of International Law* 1, 5.

⁸⁸ Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, ILO, 204th Sess. (16 November 1977) (1978) 17 I.L.M. 422.

⁸⁹ Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, ILO, 279th Sess. (17 November 2000) (2002) 41 I.L.M. 186. Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_101234.pdf [Accessed 3 May 2016].

⁹⁰ Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf [Accessed 3 May 2016].

⁹¹ Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (17 November 2000), para.7 (2002) 41 I.L.M. 186. Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_101234.pdf [Accessed 3 May 2016].

⁹² Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (2002) 41 I.L.M. 187.

⁹³ Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, para.8 [2002] 41 I.L.M. 186.

⁹⁴ Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, para.36 (2002) 41 I.L.M. 186.

⁹⁵ J. Oldenziel, “The Added Value of the UN Norms: A Comparative Analysis of the UN Norms for Business With Existing International Instruments” (Amsterdam: April 2005), p.15; and Philip Rudolph, “Tripartite Declaration of Principles Concerning Multinational Enterprises” in Ramon Mullerat (ed.), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (Kluwer Law International, 2005), p.219.

⁹⁶ ILO, “Tripartite Declaration. Follow-up Survey”. Available at: http://www.ilo.org/empent/Informationresources/WCMS_101251/lang--en/index.htm [Accessed 3 May 2015].

⁹⁷ ILO, “Tripartite Declaration. Follow-up Survey”.

⁹⁸ Philip Rudolph thought that the Tripartite Declaration relied on external pressure generated by the public to influence wrongdoers to ultimately change their behaviour. Rudolph, “Tripartite Declaration of Principles Concerning Multinational Enterprises” in *Corporate Social Responsibility* (2005), p.219.

⁹⁹ Secretary-General Kofi Annan, Address at the World Economic Forum in Davos, Switzerland (31 January 1999), UN Doc. SG/SM/6448 (1999).

¹⁰⁰ The introduction of the 10th principle on corruption was announced at the Global Compact Leaders’ Summit, held in New York in June 2004.

¹⁰¹ UN Global Compact homepage, available at: <https://www.unglobalcompact.org/about> [Accessed 3 May 2016].

¹⁰² UN Global Compact homepage; and D. Leipziger, *The Corporate Responsibility Code Book*, 2nd edn (Sheffield: Greenleaf Publishing, 2003), p.72.

Principles 3–6 expressly deal with labour rights, whereas Principles 7–9 deal with the promotion of environmental rights, and Principle 10 speaks out on the fight against corruption.¹⁰³

While the principles dealing with labour rights are very specific, the same cannot be said for Principles 1 and 2 which are very broad indeed. The general promotional nature of the first two principles might therefore appeal to companies wishing to use it as a public relations instrument; however, the vagueness of these principles will be to the detriment of the effective implementation of the Global Compact.¹⁰⁴ As previously mentioned, the Global Compact is an entirely voluntary process seeking to reward good practice by publicising information for others to learn from.¹⁰⁵ Thus, companies acceding to the Global Compact must submit an annual report on the implementation of the 10 principles by providing one concrete example on how they have progressed towards these principles.¹⁰⁶ However, there are no review mechanisms and as such very few members have been noted to properly comply with the reporting requirements.¹⁰⁷ Thus, the Global Compact falls within the same voluntary categories as all the other international initiatives designed to regulate corporate behaviour.

The realisation of the Global Compact initiative was examined in 2010 by the UN Joint Inspection unit. Even though the successes of the initiative were praised, particularly with regard to the engagement of the United Nations with the private sector, some of the main criticisms focussed on the lack of a proper regulatory governmental and institutional framework, as well as the lack of a clear and articulated mandate which resulted in a rather blurred focus and impact.¹⁰⁸

However, owing to the criticisms the Global Compact received, in June 2004, a new “sanctioning” mechanism was introduced.¹⁰⁹ Consequently, if a member fails to submit its “communication on progress” within one year, they will be considered for all intents and purposes as “non-communicating” until such a report is submitted.¹¹⁰ However, where a member fails to submit its “communication on progress” within a two-year period, they will be “de-listed” and the company’s name may be published.¹¹¹ A further advancement to the Global

Compact was the introduction of a complaints procedure.¹¹² Accordingly, if a complaint signifying either the systematic or egregious abuse of the Global Compact’s principles is received, this will be passed on to the relevant company with a request for both a written explanation and any measures taken to resolve the matter.¹¹³ Thus, where a member fails to respond to a request for written information concerning a complaint within a certain period, they may be considered “non-communicating” and labelled as such on the website.¹¹⁴ While these measures could be construed as a step in the right direction towards holding MNCs to account, some academic commentators remain sceptical on whether real change can occur, owing to “past experience and the vague procedures”.¹¹⁵

The initiative reflected the UN Secretary-General’s vision of giving a human face to the global market, a rather ambitious idea that has historically stumbled across a number of obstacles. Since then, various human rights bodies have examined the effectiveness of the UN’s strategies and policies in relation to multinational corporations with a view to making proposals for strengthening the embodiment of human rights principles in the practice of multinational corporations.

Voluntary codes

The increasing demands for MNCs to behave in a socially responsible manner—emanating from non-governmental organisations (NGOs), trade unions, developed countries’ consumers, and community groups—have stemmed from the inadequacy of the current international human rights framework to adequately deal with the threats posed by MNCs.¹¹⁶ Indeed, MNCs have argued that human rights are not the concerns of corporations but rather that of states and international bodies.¹¹⁷ Furthermore, corporations have also maintained that their ultimate duty is owed to their shareholders for the purpose of wealth maximisation.¹¹⁸ However, while this view is ubiquitous, the increasing exposure of human rights abuses committed by MNCs across the globe has prompted MNCs to adopt voluntary codes of conduct to show their commitment to the protection of human rights and advancement of social

¹⁰³ For more information, see “The Ten Principles of the UN Global Compact”, available at: <https://www.unglobalcompact.org/what-is-gc/mission/principles> [Accessed 3 May 2016].

¹⁰⁴ Oldenziel, “The Added Value of the UN Norms” (April 2005), p.11.

¹⁰⁵ The Global Compact website states that “the global compact is a purely voluntary initiative, and does not police or enforce the behaviour or actions of companies. Rather, it is designed to stimulate change and to promote good corporate citizenship and encourage innovative solutions and partnerships”.

¹⁰⁶ Oldenziel, “The Added Value of the UN Norms” (April 2005), p.11.

¹⁰⁷ Oldenziel, “The Added Value of the UN Norms” (April 2005), p.12.

¹⁰⁸ UN Joint Inspection Unit, “United Nations corporate partnerships: The role and functioning of the Global Compact”, Doc. No.JIU/REP/2010/9 (Geneva: 2010).

¹⁰⁹ “United Nations Global Compact Basic Guide Communication on Progress”, available at: https://www.unglobalcompact.org/docs/communication_on_progress/Tools_and_Publications/COP_Basic_Guide.pdf [Accessed 3 May 2016].

¹¹⁰ “United Nations Global Compact Note on Integrity Measures”, available at: https://www.unglobalcompact.org/docs/about_the_gc/Integrity_measures/Integrity_Measures_Note_EN.pdf [Accessed 3 May 2016].

¹¹¹ “United Nations Global Compact Note on Integrity Measures”.

¹¹² Oldenziel, “The Added Value of the UN Norms” (April 2005), p.12.

¹¹³ “United Nations Global Compact Note on Integrity Measures”.

¹¹⁴ “United Nations Global Compact Note on Integrity Measures”.

¹¹⁵ Oldenziel, “The Added Value of the UN Norms” (April 2005), p.13.

¹¹⁶ Kinley and Tadaki, “From Talk to Walk” (2004) 44 *Virginia Journal of International Law* 931, 953.

¹¹⁷ Kinley and Tadaki, “From Talk to Walk” (2004) 44 *Virginia Journal of International Law* 931, 953.

¹¹⁸ Milton Friedman, “The Social Responsibility of Business is to Increase its Profits”, *N.Y. Times*, 13 September 1970 (Magazine), p.32.

standards. This commitment stems, not from any philanthropic motivation, but rather from an increased awareness of stakeholder expectations as well as the harm that may result from a tarnished brand image.¹¹⁹ MNCs therefore see it in their commercial interest to accede to voluntary codes of conduct, and more often than not, publicise these in the guise of socially responsible practices.¹²⁰

A profusion of voluntary codes of conduct emerged in the late 20th century with the liberalisation of trade and investment.¹²¹ The purpose of these codes of conduct was to demonstrate a commitment, beyond the letter of the law, to human rights and social standards across the globe.¹²² Today it is difficult to find a MNC that does not claim to support a voluntary code of conduct indicating adherence to principles of human rights. The earliest codes of conduct can be traced back to the Sullivan Principles, a US-based initiative targeting MNCs operating in apartheid South Africa, and the MacBride Principles, encouraging affirmative action employment programmes in Northern Ireland.¹²³ More recent codes of conduct include the Worldwide Responsible Apparel Production (WRAP),¹²⁴ US Apparel Industry Partnership's Workplace Code of Conduct¹²⁵ and the Social Accountability International (SA8000).¹²⁶ The SA8000 and WRAP initiatives are overseen by bodies that carry out social audits to monitor compliance. Similar codes of conduct have been adopted by large MNCs operating in less developed countries across the globe, such as Nike, BP, Royal Dutch Shell, and Rio Tinto, to name a few.

While the contents of each code vary considerably, environmental and labour issues remain the focus.¹²⁷ Some of these codes of conduct also explicitly address international human rights. For instance, Rio Tinto's code of conduct supports the UDHR and provides that:

"We support human rights consistent with the Universal Declaration of Human Rights and Rio Tinto respects those rights in conducting the Group's operations throughout the world."¹²⁸

However, given that the overwhelming majority of companies are motivated primarily by profit, and with the realisation that reputational damage could adversely impact their bottom-line profits, they take action to avoid such consequences,¹²⁹ as exemplified by Shell in 1995 after the death of the anti-oil activist Ken Saro-Wiwa.¹³⁰ Shell Group were harshly criticised for their failure to intervene; however, Shell maintained their position that domestic politics were a matter for the host state and not for corporations.¹³¹ Furthermore, Shell's Statement of General Business Principles supported this position.¹³² However, public scrutiny proved overwhelming and not long after the incident Shell issued a revised statement in which it acknowledged the change in public opinion.¹³³

Similarly, Nike and Gap also faced severe criticisms after high profile campaigns brought to light their use of supply chain subcontractors, who employed child labourers to work in sweatshop conditions.¹³⁴ Moreover, international trade union organisations used videos to show children stitching footballs with FIFA labels in Sialkot, Pakistan just before the World Cup in 1998.¹³⁵

¹¹⁹ Sol Picciotto, "Rights, Responsibilities and Regulation of International Business" (2003) 42 *Columbia Journal of Transnational Law* 139; and Kinley and Tadaki, "From Talk to Walk" (2004) 44 *Virginia Journal of International Law* 931, 953.

¹²⁰ Kinley and Tadaki, "From Talk to Walk" (2004) 44 *Virginia Journal of International Law* 931, 953.

¹²¹ Picciotto, "Rights, Responsibilities and Regulation of International Business" (2003) 42 *Columbia Journal of Transnational Law* 139; Redmond, "Business and human rights", OECD Watch Diplomacy Training Program, pp.13–14: "The earliest were individual company codes, adopted on the firm's own initiative; they remain the most numerous group of codes, representing 48 percent of codes in an inventory taken by the Organisation for Economic Co-operation and Development (OECD) of codes adopted by corporations based in member countries. The next most numerous group (37 percent of the inventory) were the codes issued by industry and trade associations reflecting a negotiated consensus among member firms in a particular industry; these comprise codes adopted by associations in both developed and developing countries. Finally, there are numerous model agreements usually developed by civil society organizations as benchmarks or frameworks for individual or industry codes."

¹²² Redmond, "Business and human rights", OECD Watch Diplomacy Training Program, p. 13.

¹²³ Jennifer L. Johnson, "Public-Private-Public Convergence: How the Private Actor Can Shape Public International Labor Standards" (1998) 24 *Brook. J. Int'l L.* 291; and Christopher McCrudden, "Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?" (1999) 19 *Oxford J. Legal Stud.* 167. The Sullivan Principles were in part backed by legislation.

¹²⁴ Worldwide Responsible Apparel Production (WRAP) is an independent non-profit corporation dedicated to the promotion of ethical and human manufacturing. WRAP has a certification programme, requiring manufacturers to comply with 12 universally accepted WRAP Production Principles assuring safe and healthy workplace conditions, and respect for workers' rights principles. See WRAP website for more information, available at: <http://www.wrapcompliance.org/> [Accessed 3 May 2015].

¹²⁵ Robert J. Liubicic, "Corporate Codes of Conduct and Product Labelling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives" (1998) 30 *Law & Policy International Business* 111, 125.

¹²⁶ Social Accountability International is a non-profit organisation focussing on the development, implementation and oversight of voluntary verifiable social accountability standards. The SA8000 is a way for retailers, brand companies, suppliers and other organisations to maintain just and decent working conditions throughout the supply chain. See *Social Accountability International website for more information*, available at: <http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=937> [Accessed 3 May 2016].

¹²⁷ Kathryn Gordon and Maiko Miyake, "Deciphering Codes of Corporate Conduct: A Review of Their Contents", OECD Working Papers on International Investment, No. 1999/2 (March 2000), p.12.

¹²⁸ *Human Rights Policy* (May 2012), Rio Tinto. Available at: http://www.riotinto.com/documents/ReportsPublications/Human_rights_policy.pdf [Accessed 2 September 2015].

¹²⁹ Picciotto, "Rights, Responsibilities and Regulation of International Business" (2003) 42 *Columbia Journal of Transnational Law* 139.

¹³⁰ Zerk, *Multinationals and CSR* (2006), p.23: "Saro-Wiwa was an outspoken critic of the operations of international oil companies in Nigeria, including BP and Shell. In 1993, following a series of protests (which, according to the Nigerian government, included acts of sabotage), Saro-Wiwa was arrested along with a number of other activists. On 10 November 1995, after what was widely regarded as a show trial, Saro-Wiwa was executed along with eight others."

¹³¹ Zerk, *Multinationals and CSR* (2006), p.23.

¹³² Shell, "Statement of General Business Principles" (July 1994): "Shell Companies endeavour always to act commercially, operating within existing national laws in a socially responsible manner, abstaining from participation in party politics and interference in political matters. It is, however, their legitimate right to speak out on matters which affect the interests of employees, customers and shareholders, and on matters of general interest where they have a contribution to make based on particular knowledge."

¹³³ Shell, "Statement of Business Principles" (1997). Available at: <http://www.shell.com> [Accessed 3 May 2016]. Shell companies acknowledge their "responsibility" "to express support for fundamental human rights in line with the legitimate role of business and to give proper regard to health, safety and the environment consistent with their commitment to contribute to sustainable development".

¹³⁴ Naomi Klein, *No Logo: Taking Aim at the Brand Bullies* (London: HarperCollins, 2000), p.327.

¹³⁵ Dwight W. Justice, "The International Trade Union Movement and the New Codes of Conduct" in Rhys Jenkins et al. (eds), *Corporate Responsibility and Labour Rights* (Abingdon: Routledge, 2002), p.90.

These corporations have therefore realised the impact that negative publicity can have on their high profile brand names, especially campaigns exposing the “labor behind the label”,¹³⁶ and thus the adoption of voluntary codes of conduct is undertaken to demonstrate commitment to the protection of human rights. However, the proliferation of voluntary codes of conduct has resulted in a widespread debate over their practical use and whether they are sufficient tools for dealing with human rights abuses committed by MNCs. On the one hand, corporate codes can be made legally enforceable in a number of ways. On the other hand, corporate codes attract criticism owing to their selective content, lack of monitoring appliances and implementation mechanisms.

Halina Ward notes that voluntary codes of conduct can be made legally enforceable in three distinct ways. First, corporate codes “can shape the standards of care that are legally expected of businesses”.¹³⁷ This can be achieved through the incorporation of codes directly into supplier, agency and employment contracts. For instance, a US court approved the inclusion of a warranty against “conflict diamonds” in a settlement agreement, as it was explicitly provided for in the South African diamond mining industry code.¹³⁸ Additionally, a contractual agreement that is entered into between a company and its employee by collective bargaining, and incorporates some aspect of the code, will also in effect legalise the code.¹³⁹ Secondly, the standards that MNCs expressly provide for in corporate codes may be adopted by regulatory bodies as possible reporting requirements. Regulatory bodies possess certain statutory powers and therefore have the ability to bind a code indirectly in this way. For example, French legislation requires large companies to provide non-financial reports regarding social, environmental and governance aspects.¹⁴⁰ Thirdly, companies that make claims about abiding by certain standards can quite conceivably be held liable for misrepresentation if their statements of fact are found to

be untrue.¹⁴¹ A cogent example is *Kasky v Nike*,¹⁴² where the Supreme Court of California upheld Kasky’s action against Nike for unfair and deceptive practices under California’s Unfair Competition Law and False Advertising Law.¹⁴³ Nike had published a report which commented favourably on working conditions in Nike’s Indonesian, Chinese and Vietnamese factories. However, Kasky challenged the validity of this report and argued that it was false advertising and did not comply with Nike’s corporate code of practice as maintained by Nike. The Supreme Court of California concurred that Nike’s public statement was indeed “commercial speech” and therefore was not protected by the First Amendment and consequently contravened unfair competition law.¹⁴⁴ Thus, voluntary commitments do indeed have very tangible legal consequences such as those mentioned above.

However, a number of concerns remain, on account of their voluntary nature. These codes are not only very selective in their content, but they lack the necessary monitoring and implementation mechanisms.¹⁴⁵ A study conducted by ILO to ascertain the extent of labour-related material in 215 separate enterprise codes revealed that the vast majority contained self-selected standards.¹⁴⁶ Moreover, the study also found that the mention of national laws in relation to wages was very common. However, international labour standards were rarely mentioned, and only one-quarter of the codes contained any suggestion of collective bargaining and freedom of association.¹⁴⁷ On the other hand, the majority of corporate codes are largely dependent on internal procedures to monitor their effective implementation.¹⁴⁸ Indeed, where external bodies have been sought to review the effective implementation of corporate codes, critics such as Dara O’Rourke have questioned their impartiality.¹⁴⁹ Furthermore, NGOs and trade unions have in the past refused to join the US Fair Labour Association owing to their concerns about the effective implementation of corporate codes.¹⁵⁰ While the ILO survey discussed the

¹³⁶ Klein, *No Logo* (2000), pp.369–377.

¹³⁷ Halina Ward, “Legal Issues in Corporate Citizenship” (February 2003), pp.6–7. Available at: <http://pubs.iied.org/pdfs/16000IIED.pdf> [Accessed 3 May 2016].

¹³⁸ Ward, “Legal Issues in Corporate Citizenship” (February 2003), p.6.

¹³⁹ Ward, “Legal Issues in Corporate Citizenship” (February 2003), p.6; and Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). Note that the UN’s Human Rights Norms for Corporations expressly state that “[e]ach transnational corporation or other business enterprise shall apply and incorporate these Norms into their contracts or other arrangements and dealings with contractors, sub-contractor, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporations or business enterprise in order to ensure respect for and implementation of the Norms”.

¹⁴⁰ France *Diplomatie*, available at: <http://www.diplomatie.gouv.fr/en/french-foreign-policy/economic-diplomacy-foreign-trade/corporate-social-responsibility/france-s-domestic-csr-policy/article/extra-financial-reporting-made> [Accessed 3 May 2016].

¹⁴¹ Willem J.M. van Genugten, “The Status of Transnational Corporations in International Public Law” in Asbjørn Eide et al. (eds), *Human Rights and the Oil Industry* (Antwerp: Intersentia, 2000), p.71 at pp.72–73.

¹⁴² *Nike Inc v Kasky* 123 S. Ct 2554, 2555 (2003).

¹⁴³ *Kasky v Nike* 45 P. 3d 243 (Cal. 2002): “Overturning the decisions of the lower courts, the Supreme Court of California held that since Nike’s statements were representations of fact about the company’s commercial operations, they were commercial speech, and thus not protected by the First Amendment”: *Kasky* 45 P. 3d at 247. On 26 June 2003, the US Supreme Court dismissed a writ of certiorari, relying in part on the fact that the California court had yet to decide on the substance of the case: *Nike v Kasky* 123 S. Ct 2554, 2555–2557 (2003).

¹⁴⁴ *Kasky* 123 S. Ct 2554, 2555 (2003), restating the California Supreme Court’s conclusion in *Kasky v Nike Inc* 27 Cal. 4th 939, 946, 45 P. 3d 243, 247 (2002).

¹⁴⁵ Picciotto, “Rights, Responsibilities and Regulation of International Business” (2003) 42 *Columbia Journal of Transnational Law* 142.

¹⁴⁶ International Labour Office, Working Party on the Social Dimensions of the Liberalization of International Trade, “Overview of Global Developments and Office Activities Concerning Codes of Conduct, Social Labelling and Other Private Sector Initiatives Addressing Labour Issues”, ILO Doc. GB.273/WP/SDL/1 (Rev.1) (1998), para.50; see also International Labour Office, Working Party on the Social Dimensions of the Liberalization of International Trade, “Further Examination of Questions Concerning Private Initiatives, Including Codes of Conduct”, ILO Doc. GB.274/WP/SDL/1 (1999).

¹⁴⁷ International Labour Office, “Overview of Global Developments and Office Activities”, ILO Doc. GB.273/WP/SDL/1 (Rev.1) (1998), paras 52–56; see also International Labour Office, “Further Examination of Questions”, ILO Doc. GB.274/WP/SDL/1 (1999).

¹⁴⁸ Organisation for Economic Co-operation and Development, Working Party of the Trade Committee, “Codes of Corporate Conduct: An Expanded Review of their Contents”, OECD Doc. TD/TC/WP(99)56/FINAL (2000), para. 85.

¹⁴⁹ Dara O’Rourke, “Monitoring the Monitors: A Critique of Corporate, Third-Party Labor Monitoring” in Jenkins, *Corporate Responsibility and Labour Rights* (2002), p.196.

¹⁵⁰ Rhys Jenkins, “The Political Economy of Codes of Conduct” in *Corporate Responsibility and Labour Rights* (2002), p.24.

possibility of ILO taking on a greater role in terms of specifying the content of codes as well as verifying them,¹⁵¹ they have instead resorted to a minimalistic approach whereby providing advice and guidance only.¹⁵² Thus, while corporate codes have “soft” positive effects by putting the spotlight on human rights issues and evidencing certain recognition of responsibility by the respective companies, and possibly preparing the ground for binding regulation,¹⁵³ they lack a suitable legal framework to ensure the effective enforcement and implementation of corporate codes.

On 20 November 2009, the International Labour Organisation issued the *Guidelines on Cooperation between the United Nations and the Business Sector*, calling for-profit, commercial enterprises or businesses, as well as businesses associations and coalitions to formulate and implement partnerships with the United Nations in order to achieve a common purpose or undertake a specific task and to share risks, responsibilities, resources and benefits.¹⁵⁴

UN norms

Despite numerous efforts to formulate an international framework to regulate MNCs, there remains a “gap in understanding what the international community expects when it comes to human rights”.¹⁵⁵ The United Nations Sub-Commission on the Promotion and Protection of Human Rights formed a working group “to conduct relevant background research concerning transnational corporations and human rights” for the purpose of drafting a code of conduct to regulate MNCs.¹⁵⁶ The working group, after conducting extensive research, submitted its findings to the Sub-Commission in the form of “Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprise with Regard to Human Rights”.¹⁵⁷ The Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Draft Norms) was yet another attempt to regulate MNCs

at an international level.¹⁵⁸ The Draft Norms envisaged imposing binding obligations on MNCs under international law, synonymous to those obligations already accepted by states. Thus, while the Draft Norms acknowledged states as the primary duty bearers, they required MNCs to “promote, secure the fulfilment of, respect, ensure respect of and protect” a wide range of human rights in both international and national law.¹⁵⁹

The Draft Norms had three distinct features. First, they assimilated principles expressed in international codes of conduct for business enterprises adopted by WHO, ILO and the OECD, as well as the Rio Declaration on the Environment and Development (1992), UDHR (1948), the UN World Summit on Sustainable Development (2002) and the WHO Health for All Policy for the Twenty-first Century (1998).¹⁶⁰ Secondly, they identified ideals of MNCs behaviour rather than an acceptable minimum standard of behaviour. Thus, the Draft Norms were analogous to the UDHR in its articulation of ideal standards of human rights.¹⁶¹ Thirdly, the Draft Norms were intended to be non-voluntary and therefore legally binding on MNCs. The legally binding nature is understood to be reflected in the implementation of the Draft Norms, which entails both a periodic reporting requirement and monitoring and verification by the UN.¹⁶² However, despite the above-mentioned features, which would have certainly helped close the current regulatory gap in terms of regulating MNCs at an international level, critics argued that the Draft Norms merely imposed human rights obligations on MNCs currently addressed to states.¹⁶³ There were also concerns that the Draft Norms might dilute state responsibility and thus weaken it.¹⁶⁴ As a result, the Draft Norms were abandoned and the search for a more suitable international framework to regulate MNCs began once again.¹⁶⁵

Given the non-binding nature and, consequently, the weak implementation of the Global Compact principles, in August 2003 the United Nations Sub-Commission on the Promotion and Protection of Human Rights attempted to endorse the Global Compact principles in a different

¹⁵¹ International Labour Office, “Overview of Global Developments and Office Activities”, ILO Doc. GB.273/WP/SDL/1 (Rev.1) (1998), para.138.

¹⁵² International Labour Office, Working Party on the Social Dimension of Globalization, “Information Note on Corporate Social Responsibility and International Labour Standards”, ILO Doc. GB286/WP/SDG/4 (2003).

¹⁵³ Johnson, “Public-Private-Public Convergence” (1998) 24 Brook. J. Int’l L. 291.

¹⁵⁴ *Guidelines on Cooperation between the United Nations and the Business Sector* (2009). Available at: http://www.un.org/ar/business/pdf/Guidelines_on_UN_Business_Cooperation.pdf [Accessed 4 May 2016].

¹⁵⁵ Justice Nolan, “The United Nations’ Compact with Business: Hindering or Helping the Protection of Human Rights” (2005) 24 *University of Queensland Law Journal* 458.

¹⁵⁶ See UN Sub-Commission on the Promotion and Protection of Human Rights, “The effects of the Working Methods and Activities of Transnational Corporations on the Enjoyment of Human Rights”, Res. 2001/3, UN Doc E/CN.4/Sub.2/RES/2001/3 (2001).

¹⁵⁷ David Weissbrodt and Muria Kruger, “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights” (2003) 97 A.J.I.L. 904.

¹⁵⁸ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). Available at: <http://www1.umn.edu/humanrts/business/norms-Aug2003.html> [Accessed 4 May 2016].

¹⁵⁹ Draft Norms (2003), para.1.

¹⁶⁰ Denis G. Arnold, “Transnational Corporations and the Duty to Respect Basic Human Rights” (2010) 20(3) *Business Ethics Quarterly* 349, 374.

¹⁶¹ Arnold, “Transnational Corporations and the Duty to Respect Basic Human Rights” (2010) 20(3) *Business Ethics Quarterly* 349, 375.

¹⁶² Arnold, “Transnational Corporations and the Duty to Respect Basic Human Rights” (2010) 20(3) *Business Ethics Quarterly* 349, 376; Weissbrodt and Kruger, “Norms on the Responsibilities of Transnational Corporations” (2003) 97 A.J.I.L. 913; and Draft Norms (2003), paras 15 and 16.

¹⁶³ Simon Chesterman, “Lawyers, Guns, and Money: The Governance of Business Activities in Conflict Zones” (2010–11) 11 *Chicago Journal of International Law* 321, 327.

¹⁶⁴ Larry Cata Backer, “On the Evolution of the United Nations’ ‘Protect-Respect-Remedy’ Project: The State, the Corporation and Human Rights in a Global Governance Context” (2011) 9 *Santa Clara Journal of International Law* 37, 46.

¹⁶⁵ Harmen van der Wilt, “Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities” (2013) 12 *Chinese Journal of International Law* 43, 45: “The extension of jurisdiction to corporate entities made it onto the agenda of the 2010 Kampala Review Conference, but received only limited attention due to the strong focus on the crime of aggression.”

text and adopted a more proactive approach to ensure that the principles would be taken more seriously. It did so, by adopting the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”.¹⁶⁶ Even though these are not legally binding, the Draft Norms have met with a mixed response in scholarly debate.¹⁶⁷ They have been described as an important restatement of existing international human rights law by some¹⁶⁸ and as a “lost cause” by others.¹⁶⁹

At European level, the Council of Europe has tried to lay out similar standards on the basis of the aforementioned Norms of 2003, albeit through a non-binding instrument. Resolution 1757 (2010), among other things, calls upon Member States to:

- “7.2. Encourage the implementation of the United Nations ‘Norms on the Responsibilities of Transnational Corporations and other Business enterprises with Regard to Human Rights’ by business entities registered within their jurisdiction;
- 7.3. Legislate, if necessary, to protect individuals from corporate abuses of rights enshrined in the Convention and in the revised European Social Charter (ETS No. 163).”¹⁷⁰

The situation in the EU is equally discouraging. A large scale study carried out by De Schutter into multinationals under EU law reiterated the failure of the mechanisms for imposing human rights obligations on multinational enterprises and regulating their conduct.¹⁷¹

Guiding Principles on Business and Human Rights

In response to the failure of the Draft Norms, the UN Sub-Commission asked the UN Secretary-General to assign a Special Representative of the Secretary-General (SRSG) to the issue of human rights and business enterprises.¹⁷² In 2005, the UN Secretary-General appointed John Gerard Ruggie (co-author of the Global

Compact) as the UN SRSG with a mandate consisting of three parts concerning human rights and business enterprises.¹⁷³ It includes:

“to identify and clarify standards of corporate responsibility and accountability for businesses and human rights; clarify the implications for businesses of concepts such as ‘complicity’ and ‘sphere of influence’; develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises”.¹⁷⁴

The main purpose of the SRSG was to establish a policy framework to understand the responsibilities of business enterprises in relation to human rights.¹⁷⁵ In 2008, the SRSG recommended a conceptual framework on business and human rights based on three fundamental pillars: “protect, respect and remedy” (the Ruggie Framework).¹⁷⁶ The Ruggie Framework provides that it is

“the state’s duty to ‘protect’ against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to ‘respect’ human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and greater access by victims to effective ‘remedy’, both judicial and non-judicial”.¹⁷⁷

In 2010, the SRSG provided recommendations for the implementation of the Ruggie Framework, which was subsequently approved in June 2011 by the Human Rights Council (HRC), resulting in the development of the “Guiding Principles on Business and Human Rights” (the Ruggie Principles).¹⁷⁸ The Ruggie Framework clearly identifies that it is ultimately the state’s responsibility to ensure the fulfilment of human rights obligations under international law by protecting them against abuse, including those perpetrated by MNCs. States are therefore required to assess, enact and enforce legislation concerning human rights, provide companies with advice

¹⁶⁶ Draft Norms (2003).

¹⁶⁷ For a detailed discussion concerning the arguments for and against the norms, see David Kinley and Rachel Chambers, “The UN Human Rights Norms for Corporations: The Private Implications for Public International Law” (2006) 6 *Human Rights Law Review* 447.

¹⁶⁸ Celia Wells and Juanita Elias, “Corporate Complicity in Rights Violations” in Alston, *Non-State Actors and Human Rights* (2005), p.151.

¹⁶⁹ David Kinley, Justine Nolan and Natalie Zerial, “The Norms are dead! Long live the Norms! The politics behind the UN Human Rights Norms for corporations” in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, 2007), p.459.

¹⁷⁰ Parliamentary Assembly of the Council of Europe, Resolution 1757 (2010), Business and Human Rights. Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17903&lang=en> [Accessed 4 May 2016].

¹⁷¹ Olivier de Schutter, “The Accountability of Multinationals for Human Rights Violations in European Law” in Alston, *Non-State Actors and Human Rights* (2005), p.227.

¹⁷² UN ESCOR, Commission on Human Rights, 61st Session, Agenda Item 17, Promotion and Protection of Human Rights, UN Doc E/CN.4/2005/L.87 (2005).

¹⁷³ Jan Wouters and Ann-Luise Chane, “Multinational Corporations in International Law”, Working Paper No.129 (December 2013), p.15.

¹⁷⁴ “Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises”, available at: <http://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx> [Accessed 4 May 2016].

¹⁷⁵ Bhandary Leeladhara Mangalpaday, “Relationship between Business Corporations and Human Rights: A Legal Analysis” (15 June 2011), SSRN. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1987032 [Accessed 4 May 2016].

¹⁷⁶ “Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises”, available at: <http://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx> [Accessed 4 May 2016].

¹⁷⁷ United Nations Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, “Protect, Respect, and Remedy: a Framework for Business and Human Rights”, UN Doc/CN.4/2006/97 (February 2006). See “The UN ‘Protect, Respect and Remedy’ Framework for Business and Human Rights”, available at: <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf> [Accessed 4 May 2016].

¹⁷⁸ UN Guiding Principles on Business and Human Rights (2011).

and guidance on issues of human rights, and actively encourage respect for human rights by corporate associates.¹⁷⁹

The second part of the Ruggie Framework highlights corporate responsibility to respect all forms of international human rights, and this includes both in terms of “social expectation” and in “prudential risk management”.¹⁸⁰ Businesses are therefore required to “avoid causing or contributing to adverse human rights impacts ... and address such impacts when they occur”, and to “seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships”.¹⁸¹ Corporate responsibility therefore differs considerably from state duty. States not only have to respect human rights, but must also ensure their protection and fulfilment, whereas companies only have to ensure responsible business practices to avoid infringing human rights. The Ruggie Principles recommend businesses to implement:

“(a) a policy commitment to meet their responsibility to respect human rights; (b) a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; (c) processes to enable the remediation of any adverse human rights they cause or to which they contribute”.¹⁸²

The SRSG, however, rejected the idea of compiling a complete list of human rights for business enterprises to observe and respect, and instead stated that “business enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights”, and thus their “responsibility to respect applies to all such rights”.¹⁸³

The final part of the Ruggie Framework provides that access to remedy must be available to all victims of human rights abuse. Thus, states must provide a “mechanism to investigate, punish, and redress abuses”,¹⁸⁴

and business enterprises are recommended to “develop and deploy grievance mechanisms for alleged human rights abuses”.¹⁸⁵

The response to the Ruggie Principles has been equivocal. On the one hand, supporters of the Ruggie Framework have openly praised the consultative process for effectively bringing to light issues of human rights¹⁸⁶ and lauded the clear distinction between the duty of states and the responsibility of corporations. Moreover, business enterprises which have consistently fought against binding obligations of human rights in the past and opposed all previous attempts at regulating corporate behaviour have welcomed this new initiative. Furthermore, states have responded positively to the Ruggie Framework and made efforts to implement the Ruggie Principles at both domestic and regional levels. On the other hand, NGOs have criticised the Ruggie Framework for merely imposing non-binding obligations on businesses. Additionally, critics have also condemned the overemphasis on processes at the expense of substance.¹⁸⁷

While the Ruggie Principles are appealing, they do not constitute an international instrument, nor do they create binding legal obligations. Instead, they simply clarify existing international human rights standards directed at states, and provide guidance on how to put them into action.¹⁸⁸ It therefore remains the states’ duty to protect human rights, while MNCs simply have to respect human rights. MNCs therefore do not have any binding legal obligations concerning human rights at an international level and thus remain regulated only at a domestic level. This allows them to continue exploiting less developed countries with weak regulations in order to evade their human rights obligations.

MNCs are indeed discernible entities at a global level, but the inability of domestic and international laws to grapple with these entities has resulted in a legal vacuum. It is perhaps therefore time to find an alternative approach to regulate their conduct. Thus far, legal discourse has centred on the possibility of establishing a binding code of conduct to regulate MNCs,¹⁸⁹ the adoption of a Charter of Human Rights to govern the activities of MNCs¹⁹⁰ and

¹⁷⁹ United Nations Special Representative of the Secretary-General, “Protect, Respect, and Remedy”, UN DocE/CN.4/2006/97 (February 2006). See “The UN ‘Protect, Respect and Remedy’ Framework for Business and Human Rights”.

¹⁸⁰ United Nations Special Representative, “Protect, Respect, and Remedy”, UN DocE/CN.4/2006/97 (February 2006), p.12. See “The UN ‘Protect, Respect and Remedy’ Framework for Business and Human Rights”, p.12.

¹⁸¹ UNHRC, “Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie” (2001) UN Doc. A/HRC/17/31, para.13.

¹⁸² UNHRC, “Report of the Special Representative of the Secretary-General, John Ruggie” (2001) UN Doc. A/HRC/17/31, para.15.

¹⁸³ UNHRC, “Report of the Special Representative of the Secretary-General, John Ruggie” (2001) UN Doc. A/HRC/17/31, para.12.

¹⁸⁴ United Nations Special Representative of the Secretary-General, “Protect, Respect, and Remedy”, UN DocE/CN.4/2006/97 (February 2006), p.12. See “The UN ‘Protect, Respect and Remedy’ Framework for Business and Human Rights”, p.17.

¹⁸⁵ United Nations Special Representative of the Secretary-General, “Protect, Respect, and Remedy”, UN DocE/CN.4/2006/97 (February 2006), p.12. See “The UN ‘Protect, Respect and Remedy’ Framework for Business and Human Rights”, p.17.

¹⁸⁶ Susan Ariel Aaronson and Ian Higham, “Re-righting Business”: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms” (2013) 35 *Human Rights Quarterly* 333, 336.

¹⁸⁷ Wouters and Chane, “Multinational Corporations in International Law”, Working Paper No.129 (December 2013), p.17.

¹⁸⁸ United Nations Special Representative of the Secretary-General, “Protect, Respect, and Remedy”, UN DocE/CN.4/2006/97 (February 2006), p.12. See “The UN ‘Protect, Respect and Remedy’ Framework for Business and Human Rights”.

¹⁸⁹ See Draft United Nations Code of Conduct on Transnational Corporations, UN Centre on Transnational Corporations, Special Session (7–18 March 1983 and 9–20 May 1983) UN Doc.E/C.10/1982/6 (1986).

¹⁹⁰ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), approved 13 August 2003, by UN Sub-Commission on the Promotion and Protection of Human Rights Resolution 2003/16, UN Doc.E/CN.4/Sub.2/2003/L.11, 52 (2003).

a global institute to supervise the practices of MNCs.¹⁹¹ Despite some merit in these recommendations, progress has virtually been non-existent owing to difficulties in establishing a locus in international law to regulate the activities of MNCs. Overall, international attempts thus far have been unsuccessful and cannot compel MNCs to behave in a socially responsible manner. Owing to the failures of international law, the only way to hold MNCs accountable for their abusive practices is to impose legal personality on them at an international level.

On 26 June 2011, the UN Human Rights Council decided to endorse three core Guiding Principles in Resolution 17/4. The Guiding Principles were developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, and consist of the following principles: (1) states owe a duty to protect human rights through a set of foundational and operational principles; (2) transnational corporations and other business enterprises have a corporate responsibility to respect human rights; and finally, (3) states have a duty to provide access to effective legal remedies through judicial and non-judicial mechanisms.¹⁹² The Guiding Principles apply to all states and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership or structure.

The Guiding Principles are to be realised on the basis of specific foundational principles. For example, in relation to protecting human rights, the guidance suggests that: (1) states are required to protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication; and (2) states are required to set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.¹⁹³

To implement the Guiding Principles, Resolution 17/4 establishes an annual Forum on Business and Human Rights under the guidance and auspices of the Working Group on the issue of Human Rights and Transnational Corporations and other Business Enterprises.¹⁹⁴ The Forum on Business and Human Rights meets yearly to discuss trends and challenges in the implementation of the Guiding Principles, and to promote dialogue and

co-operation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices.¹⁹⁵

The Human Rights Council has asked that the Forum shall be open to the participation of States, United Nations mechanisms, bodies and specialised agencies, funds and programmes, intergovernmental organisations, regional organisations and mechanisms in the field of human rights, national human rights institutions and other relevant bodies, transnational corporations and other business enterprises, business associations, labour unions, academics and experts in the field of business and human rights, representatives of indigenous peoples and non-governmental organisations in consultative status with the Economic and Social Council.¹⁹⁶

In assessing the effectiveness of the Guiding Principles, in 2012 the United Nations Secretary-General identified the lack of capacity among all relevant actors as one of the key obstacles to advancing the business and human rights agenda and the implementation of the Guiding Principles.¹⁹⁷

In more recent years, discussions at the UN level focussed on new possibilities for co-operation between the United Nations and multinational corporations. One of the goals of the 2013 Forum on Business and Human Rights¹⁹⁸ was to offer an opportunity for capacity building.¹⁹⁹

The 2013 Forum identified a number of challenges, including the unwillingness of host governments to recognise human rights challenges and to work with companies and representatives of civil society groups to implement these initiatives, as well as the lack of knowledge of labour and human rights standards among producers, including the Guiding Principles, and the importance of integrating human rights and due diligence.

It emphasised the role of the business sector in harmonising their safeguarding policies and requesting that states adopt national implementation plans. It further suggested that the regional systems could align their sanctions with the Guiding Principles' expectations of companies in relation to the provision of adequate remedies, given that a weak rule of law in some countries continues to impede access to an effective remedy. Finally, representatives suggested: (1) more commitment of states through national action plans; (2) the engagement of regional organisations with the view of mainstreaming

¹⁹¹ K. Alexander, "The Need for Efficient International Financial Regulation and the Role of a Global Supervisor" (2001) 5(1) *Journal of Money Laundering Control* 52; K. Alexander, R. Dhumale and J. Eatwell, *Global Governance of Financial Systems: Regulating Systemic Risk to Promote Financial Stability* (Oxford: Oxford University Press, 2005).

¹⁹² Office of the UN High Commissioner, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, respect and remedy' Framework" (2011). Available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [Accessed 4 May 2016].

¹⁹³ United Nations "Protect, respect and remedy" Framework" (2011), p.3.

¹⁹⁴ Human Rights Council, "Human Rights and Transnational Corporations and other Business Enterprises", Resolution 17/4 (6 July 2011).

¹⁹⁵ Resolution 17/4 (2011), para.13.

¹⁹⁶ Resolution 17/4 (2011), para.14.

¹⁹⁷ Human Rights Council, "Contribution of the United Nations system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human Rights", Doc. No.A/HRC/21/21 (2 July 2012). Available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-21_en.pdf [Accessed 4 May 2016].

¹⁹⁸ 2013 UN Forum on Business and Human Rights, proceedings of the sessions, available at: <http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2013ForumonBusinessandHumanRights.aspx> [Accessed 4 May 2016].

¹⁹⁹ Human Rights Council, Summary of discussions of the Forum on Business and Human Rights, prepared by the Chairperson, Makarim Wibisono, UN Doc. A/HRC/FBHR/2013/4 (2–4 December 2013). Available at: <http://www.ohchr.org/Documents/Issues/Business/ForumSession2/ListOfReferences.pdf> [Accessed 4 May 2016].

the Guiding Principles into their charters, policies and justice and accountability systems; (3) integrating the Guiding Principles in the post-2015 development agenda and into the work of global institutions and the United Nations system; (4) the creation of a global fund for capacity building; and (5) an adjusted focus of the work of the Working Group.

Overall, the current framework concerning the responsibilities of multinational corporations seems weak and vague, given that the soft law instruments that are currently in place do not impose binding obligations but merely suggest principles of good practice and codes of conduct, which are voluntary in nature. The documents and initiatives presented in this article represent forms of soft law with limited opportunities for effective enforcement. It is further argued that there is a strong clash between the non-binding nature of the current framework (most notably the UN Guiding Principles) and the binding character of international human rights law. It is, of course, important to emphasise that certain specialised treaties of a multilateral nature impose direct obligations on corporations, such as the 1969 Convention on Civil Liability for Oil Pollution Damage and the 1982 UN Convention on the Law of the Sea. Nevertheless, these treaties are relevant in isolated incidents concerning liability for large-scale catastrophes and do not represent any set of coherent legal principles in relation to accountability for multinational corporations.

Issues concerning the regulation of MNCs have predominantly resulted from human rights abuses. The previous section traced the development of international law to determine to what extent MNCs were currently regulated at an international level. It was revealed that MNCs are regulated only by “soft law” initiatives which cannot compel them to adhere to principles of human rights. The following section proposes an international personality for the international company in order to hold MNCs accountable for human rights. Additionally, a further proposal is to codify the extant Ruggie Principles at an international level into a binding treaty in order to hold MNCs accountable for human rights.

The way forward

As a way forward, we suggest that in order to hold MNCs accountable for human rights abuses, a new framework is required, involving the concept of an international company with an international legal personality to close the current regulatory gaps. Indeed, in order to establish

an international company, it is prudent to first facilitate the recognition of its corporate personality and duties at an international level.²⁰⁰ The United Nations is a suitable intergovernmental organisation to advance a model framework for the realisation of this concept. It is hoped that this concept might perhaps be more successful than all previous attempts by the United Nations to govern the activities of MNCs in relation to human rights.

The personality of the international company will be both distinct and separate from all other international companies, and companies in general, but it will remain associated with its subsidiaries. The proposed framework will describe the concept of global corporations. Furthermore, the liability of a parent company in relation to its shareholding in a subsidiary will be defined in the context of global corporations. However, this liability will differ from individual shareholders liability at domestic level. Additionally, the requirement for a disclosure system for global corporations at an international level will be addressed in the framework. While Member States will have the option, they will be encouraged to incorporate the international company provisions into their domestic laws.

States that choose to adopt the international company framework will require any companies that satisfy the global corporation criteria, and wishing to operate in domestic territory, to obtain the status of an international company prior to their operations. The United Nations will support this framework by employing a global registry for international corporations. The body charged with registering global corporations will issue international company certificates and simultaneously maintain a paper trail of the operations of all registered international companies. All laws pertaining to the international company will be imposed at a domestic level; however, a provision will be incorporated into the framework for a panel of experts to deal solely with issues of interpretation and application of the framework. The proposed framework is intended to deal with regulatory gaps caused by the operations of global companies and therefore does not address matters of internal regulation.

A recent report summarising the findings of a research project carried out by the University of Liverpool identified the following barriers to creating a new international mechanism to address corporate harms: the economic and political power of corporations; the imposition of legal restrictions on corporations could have the effect of imposing an effective social wage on weaker economies; the structure of the modern corporation as

²⁰⁰ This will be similar to the provisions of the European Company (Societas Europaea or SE) Regulation 2004. The EU Statute intervenes in matters which are essential to enable companies to maximise their potential and leaves other matters within national remit as they were before the statute: “The purpose of the SE is to meet the challenges of globalised markets and to achieve the aim of a common market in Europe. The statute gives companies operating in more than one Member State the option of being established with a European corporate identity and operating with one set of rules and a unified management system or even as a single merged company. Under art.2 and Title II of the Regulation, there are five exclusive ways of forming an SE. Each alternative reflects the basic requirement that a cross-border or international element must exist. Firstly, existing public limited-liability companies can merge to form an SE, provided that at least two of the companies involved come from different Member States. Secondly, companies—both public and private limited-liability companies—can form a holding SE if more than 50% of the capital of each of the promoting companies is contributed and at least two of the promoting companies are from different Member States or have had a subsidiary or branch in another Member State for at least two years. Thirdly, with the same condition for cross-border activity applying, a subsidiary SE may be formed as a joint venture company. Fourthly, an existing public limited-liability company can be converted into an SE, provided that it has had a subsidiary in another Member State for at least two years. Fifthly and finally, an SE itself can establish subsidiary SEs. The SE is subject to, and governed by, the national laws of the Member State of its domicile.” See CMS, “Societas Europaea”, p.4. Available at: http://www.cmslegal.com/Hubbard.FileSystem/files/Publication/74b1540e-27c1-43fa-ac4d-3439dbb90f84/Presentation/PublicationAttachment/e24c0ec3-6cc0-4438-a5e6-346dd833e798/CMS_Societas_Europaea_May2011.pdf [Accessed 4 May 2016].

“the biggest obstacle to any traditional mechanism” of corporate accountability; distinguishing the responsible party without a direct delegation of authority between the host state and the corporation; and the lack of expertise in the ECtHR and other regional courts to deal with corporate violations of human rights.²⁰¹ Given the reasons outlined in this article, and the recent research findings relating to potential mechanisms to address corporate harms, the authors suggest that one of the most prevalent issues in this regard is how to fill the accountability gap. What needs to be considered, therefore, is whether international courts have the capacity and jurisdiction to address corporate human rights issues.

Owing to its structure into specialised chambers, the International Court of Justice could support the idea of having a dedicated chamber looking into corporate human rights violations. According to art.26 of the ICJ Statute, of which the jurisdiction is recognised by 72 state parties,

“the Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labour cases and cases relating to transit and communications”.

It is therefore possible for the ICJ to create a “human rights chamber for corporate responsibility”. A serious drawback, however, is that only states are eligible to apply to the ICJ, as the court has no jurisdiction to examine complaints by individuals, non-governmental organisations, corporations or any other private entity. Even in the unlikely event that states agreed to take the responsibility for the actions of multinational corporations based in their territory, the court’s “compulsory jurisdiction”, namely that both parties must agree to the court rendering a decision, would mean that states will be able to opt out from recognising the court’s jurisdiction to consider claims.

On the other hand, an approach that seems to be more favourable in scholarly debate is the extension of the 1998 Rome Statute in the International Criminal Court (ICC) to apply to corporate, as well as natural, persons. At present, 123 countries are states parties to the Rome Statute of the International Criminal Court; therefore it has a much wider influence. Nevertheless, the Rome Statute is not provided with jurisdiction to try legal persons for offences under the Statute. According to art.25(1) of the 1998 Rome Statute, “[t]he Court shall have jurisdiction over natural persons pursuant to this Statute”.

This means that the ICC can only criminally prosecute natural persons, and not legal entities such as corporations. It is therefore suggested that art.25 of the Rome Statute needs to be amended in order to allow the court jurisdiction to try legal persons, although

commentators suggest that incorporating into the Rome Statute the approach in the Conventions of recognising criminal, civil or administrative redress for corporate wrongs is problematic, as the ICC does not have the capacity to directly enforce non-criminal remedies.²⁰² The unavailability of restitution and compensation in this regard would defeat the purpose of having the ICC involved in claims concerning human rights violations by multinational corporations.

Furthermore, the ICC deals with the most grave and serious human rights abuses and crimes of concern to the international community. Holding corporations accountable for human rights violations would not fall within the court’s mandate unless the Rome Statute is revised and efforts are made to bring corporate accountability into the court’s agenda.

Reliance on non-binding principles such as those endorsed by the United Nations in 2011 (Guiding Principles on Business and Human Rights) and previously by the OECD (*Guidelines for Multinational Enterprises*) does not provide an effective solution to the problem of corporate responsibility, as voluntary adherence to the non-binding standards jeopardises the need for implementation. It could be suggested that a binding international agreement is created, enshrining norms of corporate responsibility, which could hold companies accountable for their human rights abuses. Nevertheless, enforcement and remedial action in international law, as described above, is often problematic.

The international community should invest further on strengthening domestic legislation and bringing it up to standard with international norms of corporate responsibility—under the auspices of a UN commissioner empowered to launch investigations and oversee implementation at regular intervals. As noted in a 2008 Report to the Human Rights Council by the UN Special Representative, the failure of companies to meet their responsibility to respect human rights

“can subject companies to the courts of public opinion—comprising employees, communities, consumers, civil society, as well as investors—and occasionally to charges in actual courts. Whereas governments define the scope of legal compliance, the broader scope of the responsibility to respect is defined by social expectations—as part of what is sometimes called a company’s social licence to operate”.²⁰³

The UN Human Rights Council has also emphasised the need for international efforts to close the current regulatory gaps by stating:

²⁰¹ Stéfanie Khoury and David Whyte, “New Mechanisms for Accountability for Corporate Violations of Human Rights” (2015). Available at: https://www.liv.ac.uk/media/livacuk/sociology-social-policy-and-criminology/research/New_Mechanisms_for_Accountability.pdf [Accessed 4 May 2016].

²⁰² Kathryn Haigh, “Extending the International Criminal Court’s Jurisdiction to Corporations: Overcoming Complementarity Concerns” (2008) 14(1) *Australian Journal of Human Rights* 199.

²⁰³ Geneviève Paul and Judith Schönsteiner, “Transitional Justice and the UN Guiding Principles on Business and Human Rights” in Sabine Michalowski (ed.), *Corporate Accountability in the Context of Transitional Justice* (Abingdon: Routledge, 2013), p.73.

“Weak national legislation and implementation cannot effectively mitigate the negative impact of globalisation on vulnerable economies, fully realise the benefits of globalisation or derive maximally the benefits of activities of Transnational corporations and other business enterprises and that therefore efforts to bridge governance gaps at the national, regional and international levels are necessary.”²⁰⁴

However, the implementation and more importantly the ratification of UN resolutions once formulated and approved are notoriously slow and require a willingness on behalf of the Member States to implement legislation at the domestic level. A key issue in dealing with the potential impact of multinational companies in respect of potential human rights abuses is the relationship between the law and the juristic person that is the body corporate. In considering this relationship, particularly in respect of the equitable treatment of the natural and juristic person, a number of potential approaches may be considered. The Treaty on the Function of the European Union (TFEU, 2007) brings with it a number of clear statements in respect of the treatment of the natural person and the juristic person. Key elements of this treaty include art.18, which, in dealing with principles of non-discrimination in respect of the European citizen, specifically prohibits “discrimination on grounds of nationality”. Within this article it is clear that the principles of non-discrimination on the basis of nationality will apply to the natural person and has been tested in a number of cases (see *Reyners v Belgian*²⁰⁵, and *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve*²⁰⁶). A further extension of this principle to the juristic person was achieved through the landmark cases of *Commission of the European Communities v France* (270/83)²⁰⁷ and *R. v Inland Revenue Commissioners Ex p. Commerzbank AG (Commerzbank)*.²⁰⁸ These cases brought together what is under European law equal treatment of the “person” both in respect of equitable treatment and equal obligation across what is a complex legal and political environment. While the literature concerning the consideration of the treatment of the natural and juristic person within the model of the EU is significant and on the whole comprehensive, parity of treatment in respect of certain criminal acts for which liability rests with the natural or juristic person is not so readily achieved. Within English law, attempts to link the acts of the juristic person to the responsibilities of the natural person are fraught with difficulties. Since Denning’s statement in *HL Bolton*

Engineering Co Ltd v TJ Graham & Sons Ltd,²⁰⁹ attempts to liken the functioning of the juristic person to the organs of the natural person have proved difficult to implement. As organisations become increasingly complex, the individual “guiding mind” of the juristic person is not encapsulated within a single decision-maker and therefore the opportunity to secure conviction against the juristic person is difficult and in some cases impossible, as was the case with the *Herald of Free Enterprise* disaster in 1991.²¹⁰

This case and others, such as the Southall train crash in 1997 and the Paddington Rail crash in 1999, in which a total of 38 people were killed and in excess of 600 people were injured, prompted the UK Government to enact the Corporate Manslaughter and Homicide Act 2007 (the Act).²¹¹ Although commentators have individually questioned the relative value of the Act,²¹² the clear intent is to move away from the necessity to identify a single individual as the “guiding mind” to the company itself, and therefore it is the company as an entire entity on which the Act is focussed. While the Act itself has not been sufficiently tested to determine its efficacy in complex cases involving many individuals and complex layers of corporate activities, it does in the opinion of the authors offer a potential template by which the juristic person may be held accountable for abuses within the ambit of human rights. By directing legislation towards the entire company rather than seeking an individual decision-maker or company agent on to whom the entire blame may be placed, nation states may seek to hold the juristic person as a single entity responsible for its actions, and while the limitation of the Act in the UK prevents individual directors of the company from facing sanction, penalties imposed in the form of fines may present an opportunity for a degree of restitution for those natural persons who have suffered as a consequence of the actions of the juristic person.

It has been argued that MNCs are distinct from domestic companies, but they have nevertheless been operating at a domestic level in a regulatory vacuum. We have proposed an innovative international company framework to plug the existing regulatory gaps and hold MNCs accountable for human rights. We suggest that UN co-operation is paramount for the realisation of an international company with an international legal personality. The international company framework will certainly benefit host states from less developed nations with weak regulations. While the idea of an international company may be efficacious, academics have already

²⁰⁴ Human Rights Council, Preamble to Resolution 8/7, Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises.

²⁰⁵ *Reyners v Belgian* (2/74) [1974] E.C.R. 631; [1974] 2 C.M.L.R. 305 ECJ.

²⁰⁶ *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* (C-184/99) [2001] E.C.R. I-6193; [2002] 1 C.M.L.R. 19; [2002] I.C.R. 566 ECJ.

²⁰⁷ *Commission of the European Communities v France* (270/83) [1986] E.C.R. 273; [1987] 1 C.M.L.R. 401 ECJ.

²⁰⁸ *R. v Inland Revenue Commissioners Ex p. Commerzbank AG (Commerzbank)* (C-330/91) [1993] E.C.R. I-4017; [1993] 3 C.M.L.R. 457.

²⁰⁹ Denning LJ in *HL Bolton Engineering Co Ltd v TJ Graham & Sons Ltd* [1957] 1 Q.B. 159; [1956] 3 W.L.R. 804; [1956] 100 S.J. 816 CA.

²¹⁰ *R. v P&O European Ferries (Dover) Ltd* (1991) 93 Cr. App. R. 72; [1991] Crim. L.R. 695 CCC.

²¹¹ Corporate Manslaughter and Corporate Homicide Act 2007, available at: http://www.legislation.gov.uk/ukpga/2007/19/pdfs/ukpga_20070019_en.pdf [Accessed 4 May 2016].

²¹² F.B. Wright, “Criminal Liability of Directors and Senior Managers of Deaths at Work” [December 2007] *Criminal Law Review* 949; and R. Gobert, “The Corporate Manslaughter and Corporate Homicide Act 2007: Thirteen Years in the Making but Was It Worth the Wait?” (2008) 71(3) *Modern Law Review* 413.

proposed this reform in the past and it has failed to materialise owing to the absence of an international legal personality for global corporations.

Conclusion

As a consequence of the inability of both international and domestic laws to address the concept of MNCs, regulatory gaps have inevitably emerged in the area of human rights. MNCs pose serious challenges to the traditional legal frameworks owing to their economic relationships surpassing the control of national states and operating outside the control of national laws. MNCs are distinct from domestic companies, but they have nevertheless been operating at a domestic level in a regulatory vacuum. This method of operation has resulted in negative consequences for human rights across the globe. The transnational nature of MNCs and the absence of an appropriate regulatory framework to govern their practices require an innovative framework at an international level to regulate these practices. The proposal is to introduce an international company with

an international personality to plug the existing regulatory gaps and hold MNCs accountable for human rights violations. While the idea of an international company may be efficacious, many organisations and scholars have already proposed this reform in the past; regrettably, it has failed to materialise owing to the absence of an international legal personality for global corporations.

It is the authors' view that it would be plausible for the UN to formulate a new multilateral treaty encouraging domestic judicial restructuring in order to correct any systemic weaknesses with regard to accountability and due diligence, provide accessible redress mechanisms, and introduce more effective sanctions for companies that engage in human rights violations. This could be achieved through the codification of Principle No.2 of the Guiding Principles on Business and Human Rights. For this to take effect, the United Nations must intensify their efforts in convincing governments to adhere to a multinational treaty that will not merely codify binding duties and obligations, but will also offer the opportunity for systemic restructuring.